

# IN THE HIGH COURT OF BOMBAY AT GOA

## SECOND APPEAL NO.118/2004

Shri Manuel Francisco da Costa  
major of age, married, businessman,  
resident of House No.390,  
Near Railway Station,  
Curchorem, Goa.

..... Appellant.

V/s.

1. Smt. Valdemira Senhorina do  
Rosario Noronha alias Mira  
D'Costa major of age, resident of  
House No.43, St. Joaquim Road,  
Borda, Margao, Goa.

2. Miss Linda Presca da Costa,  
Spinster, resident of House No.43,  
St. Joaquim Raod,  
Borda, Margao, Goa.

..... Respondents.

Mr. A.F. Diniz, Advocate for the appellant.

CORAM : A.P. LAVANDE, J.

DATE : 13<sup>th</sup> April, 2005

P.C.

By this second appeal, the appellant challenges Judgment,  
Order and Decree dated 25.9.2004, passed by IIIrd Addl. District Judge,  
Margao, Goa, dismissing the Regular Civil Appeal No.104/2000/III, filed

by the appellant against the Judgment, Order and Decree dated 27.4.2000, passed by the IInd Addl. Civil Judge, Sr. Division, Margao in Special Civil Suit No.229/97/II.

2. The appellant herein filed the above mentioned suit against the respondents herein who were the defendants in the said suit, seeking a declaration that the plaintiff is not the father of defendant No.2, nor defendant No.2 is the legitimate or illegitimate child of the plaintiff and defendant No.1 and consequently, the Sub-Registrar of Births and Deaths, Margao be directed to cancel the name of the plaintiff and defendant No.1 as father and mother respectively from the birth registration records of defendant No.2 under registration No.2309 on 13.8.1976. According to the plaintiff he got married on 4.3.1973 and out of the marriage, defendant No.1 had only one issue, named Alexio Antonio Joaquim e Carmo Da Costa, who was born on 21.8.1974. According to the plaintiff, defendant No.2 was an orphan, brought by defendant No.1 from Bombay and she was not born out of the wedlock between the plaintiff and the defendant No.1.

On the basis of the pleadings, the trial Court framed the following issues :

1. Whether the plaintiff proves that defendant No.2 is not his daughter ?

2. Whether the plaintiff proves that defendant No.2 is an orphan brought by the defendant No.1 from Bombay and defendant No.2 is not born out of the wedlock between plaintiff and defendant ?

3. Whether the plaintiff proves that defendant have falsely recorded defendant No.2 as plaintiff's daughter ?

4. What relief ? What order ?

3. The trial Court, after appreciating the evidence led by the parties, decided all the issues against the plaintiff and dismissed the suit. Aggrieved by the Judgment and Decree of the trial Court, the plaintiff preferred an appeal to the District Court, which was made over to the IIIrd Addl. District Judge, Margao, who, after hearing the parties, by the impugned Judgment and Decree dismissed the appeal.

4. Mr. Diniz, learned Counsel appearing for the appellant submitted that the lower appellate Court has erred in placing reliance on Section 112 of the Evidence Act and, according to the learned Counsel, Section 112 of the Evidence Act creates a presumption in favour of the paternity, but it does not create a presumption in favour of the maternity. According to the learned Counsel defendant No.1 has not proved the fact of birth of defendant No.2 by production of hospital records or by examining any Doctor/Nurse or any other person who attended the alleged delivery. According to the learned Counsel, in the

absence of any such evidence, the question of invoking presumption under Section 112 does not arise. According to the learned Counsel, the lower appellate Court has erred in placing reliance on the birth certificate of defendant No.2 which has been produced by defendant No.1. According to the learned Counsel, admission by defendant No.1 herself in Special Civil Suit No. 37/89 clearly establishes that there was only one issue and that defendant No.2 was not born to her. According to the learned Counsel, even in the second suit bearing Special Civil Suit No.21/91, the defendant No.1 did not mention about the birth of defendant No.2. According to Mr. Diniz, the lower appellate Court being final Court on question of facts, has failed to consider all the material evidence on the record and, therefore, the appeal has to be admitted on the substantial questions of law formulated by him in the Memo of Appeal.

5. I have considered the submissions made by the learned Counsel. I have perused the Judgments passed by both the Courts below. The lower appellate Court while dismissing the appeal, has primarily relied upon Section 112 of the Evidence Act and relying upon the said Section, has held that the plaintiff had failed to discharge the burden placed on him by leading evidence that he had no access to defendant No.1 during the relevant time. At this stage, it is pertinent to note that even in the plaint filed by the plaintiff, the date, month and the

year in which the defendant left the plaintiff and went to Bombay has not been mentioned. This was important in view of the fact that the burden of proving non-access of the plaintiff to defendant No.1 was on the plaintiff and, in the absence of any such pleadings in the plaint, the finding given by the lower appellate Court that the plaintiff had failed to prove the non-access cannot be faulted. The lower appellate Court has considered the other oral evidence led by the parties as well as the documentary evidence by way of birth certificate (Exhibit DW.1/A) of defendant No.2 which was produced which shows that defendant No.2 was born on 10.8.1976. According to the lower appellate Court, the said birth certificate clearly shows the plaintiff as the father and defendant No.1 as the mother. It is pertinent to note that the birth was not registered after the filing of the suit. The fact that the birth was registered in the year 1976 itself clearly proves that defendant No.1 is the mother of defendant No.2 and the plaintiff is the father of defendant No.2. By no stretch of imagination it can be accepted that in the year 1976 defendant No.1 registered the birth of an orphan child showing the plaintiff and defendant No.1 as father and mother respectively. As stated above, the plaintiff has not averred in the plaint that he had no access to defendant No.1 at the relevant time prior to 10.8.1976. That being the position, the finding given by both the Courts below that the plaintiff had failed to prove that defendant No.2 was not child of the plaintiff and defendant No.1, cannot be faulted.

6. Having regard to the nature of the relief sought by the plaintiff, the approach of the Court in appreciating the evidence led by the parties has to be cautious and the matter has to be decided on the broader probabilities of the case. In my opinion, the lower appellate Court has correctly exercised the jurisdiction and the finding given by the lower appellate Court that the plaintiff has failed to prove that defendant No.2 is not the child of the plaintiff and defendant No.1 cannot be said to be perverse or contrary to law.

7. In view of the above, I do not find any merit in the present appeal. No substantial question of law is involved in the present appeal and, therefore, the present appeal is summarily rejected.

A .P. LAVANDE, J.

ssm